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NO. ~~81480-5~~ 81478-3

SUPREME COURT OF THE STATE OF WASHINGTON

ENVER MEŠTROVAC,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, AND THE BOARD OF INDUSTRIAL INSURANCE APPEALS,

Respondents.

DEPARTMENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Enver Meštrovac never requested any interpreter services from the Department of Labor & Industries until he hired his English-speaking attorney. He requested that the Department communicate with him through his attorney on his workers' compensation claim yet complained that the Department used English in its time-loss payment orders. When Meštrovac appealed these orders to challenge the wage computation, the Board of Industrial Insurance Appeals provided him with an interpreter for all the testimony and recorded statements throughout the hearing.

The Board properly declined to address Meštrovac's claim for Department-level interpreter services as beyond its limited scope of review under the Industrial Insurance Act, Title 51 RCW. *Meštrovac v. Dep't of Labor & Indus.*, 142 Wn. App. 693, 705-07, 176 P.3d 536 (2008). Meštrovac's claim for reimbursement for interpreter expenses he allegedly incurred at the Board is not supported by the record or law. The Court of Appeals published opinion is consistent with precedent and provides sufficient guidance on the issues raised. Review is not warranted.[1]

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[1] Similar arguments were raised and rejected by the Court of Appeals in four other cases involving six other Bosnian-speaking claimants represented by the same attorney who represents Meštrovac. *See Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 175 P.3d 1117 (2008); *Ferenćak v. Dep't of Labor & Indus.*, 142 Wn. App. 713, 175 P.3d 1109 (2008); *Mašić v. Dep't of Labor & Indus.*, No. 81759-6; *Resulović v. Dep't of Labor & Indus.*, No. 81758-8. Although review is being sought in all of these cases, they are not uniform and do not equally preserve or present the issues claimed.

II. COUNTERSTATEMENT OF THE ISSUES

1. When Meštrovac asked the Department to communicate via his English-speaking attorney, did its English orders constitute an appealable denial of interpreter services?

2. Is there any basis in law or fact to support Meštrovac's claim that he is entitled to reimbursement for interpreter expenses he allegedly incurred at the Board?

3. Did the Department properly exclude employer taxes for government benefits from Meštrovac's wage computation as not wages he received as part of the contract of hire?

4. Does the statutory wage calculation based on Meštrovac's full-time employment already factor in his vacation and holiday pay (pay without actual work)?

5. Does Meštrovac's belated equal protection challenge fail to show workers who are continuously employed and those who are not are similarly situated for wage computation?

III. COUNTERSTATEMENT OF THE FACTS

A. Department Claim Administration

In May 2003, Meštrovac applied for workers' compensation, which the Department allowed. Certified Appeal Board Record (BR) 743 (stipulated history); Finding of Fact (FF)[2] 1. On October 10, 2003, he notified the Department that he was represented by his attorney and asked the Department to direct all of its communications on his claim to his attorney. BR 279-80. On October 20, 2003, his attorney asked the

[2] Findings of Fact refer to those made by the Board and adopted by the superior court and pertain to the wage computation issues. Copies of the superior court orders (CP 527-29, 532-33, 643-44), Board order (BR 1-10), and the Department orders at issue (BR 160, 719, 735) are attached as Appendices A, B, and C, respectively.

Department to pay for Meštrovac's "communications with his health care providers, DLI, the Board, voc rehab personnel, IME examiners, and his counsel through all phases of his claims and appeals thereon." BR 284-85.

Meanwhile, in October and November 2003, the Department issued three time-loss wage replacement orders, one mailed to Meštrovac, the others to his attorney. BR 160, 719, 735; FF 1. The orders were based on the Department's computation of Meštrovac's monthly wage of $1,584. BR 273; FF 1. Meštrovac appealed the orders to the Board, challenging the wage computation and also complaining that the Department did not provide sufficient interpreter services. BR 155-59, 714-18, 730-34; FF 1.

B. Board Proceeding

The Board provided Meštrovac with an interpreter at its expense throughout the hearing, but not for his private communications with his attorney.[3] The industrial appeals judge (IAJ) issued a proposed decision reversing the time-loss orders and setting a higher monthly wage, $2,119.41. BR 132-52. The IAJ declined to address Meštrovac's claim for Department-level interpreter services because the Board jurisdiction was limited to reviewing the orders at issue. BR 511. Meštrovac and the Department petitioned the Board for review. BR 36-90, 95-101.

[3] Meštrovac presented his testimony and the testimony of labor economist (Robert Moss), a Department adjudicator trainee (Robert Rendon), and his former employer human resource manager (Cindy Hartzer).

The Board affirmed the proposed decision, except to correct the IAJ's error in including extra values for holiday and vacation pay when there was no evidence Meštrovac ever worked any holiday and when he was eligible to cash out accrued vacation only upon discharge, which he did. BR 1-10. The Board order set his monthly wage at $2,012.01. BR 8-9. Meštrovac appealed to King County Superior Court. CP 1-3.

C. Court Proceedings

The superior court affirmed all the Board findings and conclusions on wage computation, agreeing with Meštrovac only on his claim for interpreter services. CP at 527-33. The court ruled that it had jurisdiction over his claim for Department-level interpreter services and that the Board should have addressed it. CP 643-44. The court ordered the Board to determine the amount of his interpreter expenses and ordered the Department *and* the Board to pay for those incurred at the Department and the Board, respectively, with interest. CP 644. The court denied the Board intervention. CP 739-41, 956-57.

The Court of Appeals published an opinion in favor of the Department, reversing on the interpreter issues and affirming on the wage issues. *Meštrovac*, 142 Wn. App. at 698-713. This petition followed.

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IV. REASONS WHY THE COURT SHOULD DENY REVIEW

Meštrovac presents a number of interpreter and wage computation issues juxtaposed with a variety of constitutional provisions, statutes, rules, and policies, many raised for the first time before this Court. He offers scant analysis or authority to support his petition.

The Court of Appeals correctly followed established precedent in upholding the wage computation made by the Board and affirmed by the superior court. Meštrovac's arguments on the interpreter issues lack factual support and, like his wage arguments, present no basis for review.

However, if this Court decides that an issue meets the review criteria, the Court should identify and limit review to that issue.

A. Neither Facts Nor Law Support Meštrovac's Claim That The Department Time-Loss Payment Orders Constituted Appealable Actions Or Decisions Denying Interpreter Services

The Court of Appeals concluded that the Board properly declined to address, as beyond its jurisdiction, Meštrovac's claim for Department-level interpreter services. *Meštrovac*, 142 Wn. App. at 705-07. The court rejected, on both legal and factual grounds, Meštrovac's claim that the Department issuing him the appealed time-loss orders in English constituted an appealable "action" or "decision" denying him interpreter services under RCW 51.52.050. *Meštrovac*, 142 Wn. App. at 705-07.

But Meštrovac seeks review of the Court of Appeals legal basis for rejecting it – that for a Department action or decision to be appealable, it "must be in writing". *Meštrovac*, 142 Wn. App. at 705; Petition at 18-19. Review is not appropriate, first and foremost because the record does not support the factual basis of his claim that the Department took or made any "action" or "decision," *written or otherwise*, denying him interpreter services. *See id.* at 707 n.15; BR 280. He never challenged the established principle that the Board jurisdiction is limited to what the Department has addressed in an action or decision aggrieving a party, and the court jurisdiction to what the Board has properly decided.[4] The Board thus properly declined his request to decide whether the Department should have provided more interpreter services when processing his claim.

Here, no evidence supports Meštrovac's claim that the Department denied his request to translate the appealed orders or knew his inability to understand written English when issuing them.[5] The orders were issued on October 10 and 23 and November 7, 2003. In his signed letter dated October 10, 2003, Meštrovac asked the Department to direct all of its

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[4] RCW 51.52.050, .115; *Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969) (court may not address matters not presented to the Board); *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 661-64, 879 P.2d 326 (1994) (court may not address matters the Board improperly addressed without prior Department decision); *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970) (same).

[5] Meštrovac incorrectly asserts these claims are "undisputed." Petition at 18. In its reply brief filed with the Court of Appeals at 2-4, the Department showed the incorrectness of the claims made in his amended respondent brief at 4-5, 12.

communications on his claim to his English-speaking attorney, thus indicating "there was no such need for translated orders." *Meštrovac*, 142 Wn. App. at 707 n.15; BR 280. Following his request, the Department sent the October 23 and November 7 orders to his attorney. BR 719, 735. He cannot reasonably claim these orders denied him interpreter services.

In claiming the Department knew he did not understand English, Meštrovac points only to the testimony of a Department claim adjudicator trainee Robert Rendon, that, when he received a call from Meštrovac on August 20, 2003, he noticed Meštrovac was not a native English speaker. Petition at 3; Rendon (8/6/04) 110, 114.[6] But Rendon testified that, although Meštrovac had a "light to a medium accent," Rendon had no difficulty understanding him. Rendon (8/6/04) 111. In fact, Rendon asked Meštrovac for a written statement on his work termination, and, shortly thereafter received one from him describing his termination. Rendon (8/6/04) 112-15. Rendon's testimony disproves Meštrovac's claim the Department should have known he was LEP.

In any event, the Court of Appeals correctly concluded that the "action" or "decision" in RCW 51.52.050 contemplates one "in writing." *Meštrovac*, 142 Wn. App. at 705; *Ferenćak*, 142 Wn. App. at 727.

[6] This answer refers to the testimony by "TR" or the witness's surname, followed by the date of the proceeding and the page number of the transcript where the testimony is found and refers to the Board exhibits as "BR Ex." The transcripts and the exhibits are in the Certified Appeal Board Record.

Although subsection (2)(a) allows an aggrieved party to appeal any Department "action" or "decision," subsection (1) qualifies that the Department must serve a "copy" of such an action or decision on affected parties. *See* RCW 51.52.050. RCW 51.52.060 requires an appealing party to file a notice of appeal within 60 days of receiving such a "copy." "Read together, these statutes imply that for a Department decision to be appealable it must be in writing and served on the worker." *Ferenćak*, 142 Wn. App. at 727; *Meštrovac*, 142 Wn. App. at 705.

Meštrovac claims the Court of Appeals holding would leave workers with no remedy but a writ of mandamus, if the Department refuses to issue a written decision denying interpreter services. Petition at 19. This argument is based on a hypothetical, which, as shown above, is not present here. Nor is there any problem with using a writ of mandamus to remedy such a situation. *See Cena v. Dep't of Labor & Indus.*, 121 Wn. App. 352, 358 n.13, 88 P.3d 432 (2004) ("If [a worker] was as frustrated with the process as counsel claims, *and could not procure a decision from L&I*, [he] could have filed a writ of mandamus pursuant to RCW 7.16.160 in superior court to compel agency action."), *review denied*, 153 Wn.2d 1009 (2005); *Dils v. Dep't of Labor & Indus.*, 51 Wn. App. 216, 220, 752

P.2d 1357 (1988) (same).[7]

B. Whether Chapter 2.43 RCW Applies To Department Claim Administration Is Not At Issue, And The Statute Allocated Interpreter Costs To Meštrovac At The Board Hearing

As discussed above, the Court of Appeals properly declined to address, as not properly before it, Meštrovac's claim for Department-level interpreter services, including his argument that the Department *ex parte* claim administration is a "legal proceeding" to which Washington interpreter statute, chapter 2.43 RCW, applies. *See Meštrovac*, 142 Wn. App. at 705-07. His argument on this issue (Petition at 5-7) is thus not at issue in this case and does not create any basis for review. Further, it lacks merit. *See Kustura*, 142 Wn. App. at 677-80. *Kustura* provides clear guidance on this issue, and Meštrovac offers no good reason for this Court to review the only reasonable interpretation of chapter 2.43 RCW. Department Answer to the Petition in *Kustura* at 13-15.

As to interpreter services during the legal proceeding at the Board, Meštrovac now argues he "incurred interpreter expenses" because the IAJ did not allow the appointed interpreter to translate his private

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[7] Although Meštrovac relies on language in *Dils* that a worker may appeal Department claim processing procedure, that language, read in context, means that a worker may secure an appealable decision and appeal it to the Board. As the *Dils* court said, "Assuming for the moment that neither the Department nor the Board responded to Dils' objections, Dils could have petitioned the court for a writ of mandamus pursuant to RCW 7.16.160 in order to compel agency action." *Dils*, 51 Wn. App. at 219. *Cena* confirmed that this is the correct reading of *Dils*. *See Cena*, 121 Wn. App. at 358 n.13.

communications with his attorney during the hearing and that he is entitled to reimbursement. Petition at 7. He relies on the Court of Appeals limited holding that the Board should have allowed the interpreter to translate such communications. *See Meštrovac*, 142 Wn. App. at 708.[8]

But Meštrovac neither challenges nor addresses the court's primary holding that he was not entitled to *free* interpreter services at the Board under the interpreter cost-allocating statute, RCW 2.43.040, because the Board proceeding was not one initiated by government as in a criminal prosecution. *Meštrovac*, 142 Wn. App. at 709 n.21. The statute allocates interpreter costs to "the governmental body initiating the legal proceeding," RCW 2.43.040(2), or to "the non-English-speaking person, unless such person is indigent," RCW 2.43.040(3). Meštrovac initiated the Board proceeding by filing an appeal. RCW 51.52.060. He never claimed indigency. The statute thus allocated interpreter costs to him. *Meštrovac*, 142 Wn. App. at 709 n.21. Because he was not entitled to free interpreter services, there is no reason to review his reimbursement claim.

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[8] If this Court accepts review in this case, the Department requests that the Court also review this limited holding, because the Department has preserved its argument that a claimant's off-the-record confidential communications with his attorney are not part of a "legal proceeding" covered by chapter 2.43 RCW. *See* RAP 13.4(d). A contrary argument was not made by Meštrovac but by amicus WSTLA. The Department in its answer to WSTLA's amicus brief at the Court of Appeals (at 2, 13) responded that such communications are not covered by the statute, especially when there is "no constitutional right to counsel afforded indigents involved in worker compensation appeals." *In re Grove*, 127 Wn.2d 221, 238, 897 P.2d 1252 (1995).

Ignoring this holding, Meštrovac seeks review of *what he incorrectly claims* is a holding "that he was not prejudiced and, thus, not entitled to reimbursement." Petition at 7. This is not the holding. The Court of Appeals held that he was not entitled to free interpreter services, regardless of the merits of his appeal. *Meštrovac*, 142 Wn. App. at 709 n.21. It engaged in the prejudice analysis only to see whether a reversal and a new hearing was required based on its conclusion that attorney-client communications should have been translated. *Id.* at 708-09.

Further, there is no evidence Meštrovac incurred any interpreter expenses as a result of his inability to consult with his attorney during the hearing. This factual deficiency alone should preclude review. *See Obert v. Envtl. Research & Dev. Corp.*, 112 Wn.2d 323, 335, 771 P.2d 340 (1989) ("We do not give advisory opinions.").

Even if the Court of Appeals rejected Meštrovac's reimbursement claim for lack of prejudice *and* he did incur interpreter expenses, he still fails to present any basis for review. His claim of prejudice is based on case law in the unique arbitration right waiver context that considers delay and expenses as "prejudice". Petition at 7; *Steele v. Lundgren*, 85 Wn. App. 845, 858, 935 P.2d 671 (1997) (party may waive arbitration right by first conducting lengthy and aggressive litigation). But the prejudice that may support a finding of a waiver of arbitration right is different from the

prejudice in the outcome required for *a reversal.* "Absent a showing of prejudice to the outcome of the trial, an error does not constitute grounds for reversal." *Rice v. Janovich*, 109 Wn.2d 48, 63, 742 P.2d 1230 (1987).

Nor is there any conflict on this issue. Meštrovac offers no authority holding that persons incurring self-help, extra-statutory interpreter expenses are entitled to *reimbursement.* The remedy for improper denial of statutorily required interpreter services is remand for a new hearing, available only when denial was prejudicial. *See e.g., Guitierrez-Chavez v. INS*, 298 F.3d 824, 830 (9th Cir. 2002) (prejudice to the outcome required for a remand for inadequate interpreter services).

Meštrovac argues that the interpreter expenses are "benefits" under the Industrial Insurance Act, citing RCW 51.52.030. Petition at 8. His argument is not supported by the statutory language and thus presents no basis for review. The statute allows the Board to incur "such expenses as are reasonably necessary to carry out its duties" under the Act, to be paid from both the accident and medical aid funds. RCW 51.52.030. This statute does not purport to provide any benefits to workers. His claim that any Board expenses (e.g., staff salaries) are benefits for workers makes no sense, lacks support by any authority, and presents no basis for review.

Finally, Meštrovac argues that WAC 263-12-097 requires the Board to pay for the interpreter expenses it provides. Petition at 8. The

IAJ "may" appoint an interpreter, and the Board "will" pay for the interpreter expenses. WAC 263-12-097. He admits that the word "may" is permissive and discretionary. Petition at 8 n.3. Pursuant to this regulation, the Board, although not required by chapter 2.43 RCW, paid for all the interpreter services it provided to Meštrovac. No reading of the regulation requires the Board to pay for interpreter services *it does not provide.* At most, the remedy for unlawful, prejudicial denial of interpreter services is a remand, not reimbursement, but Meštrovac can offer no reason for a remand here.

In sum, Meštrovac's arguments on the interpreter issues are factually and legally deficient and present no basis for review.

C. The Court Of Appeals Properly Followed Precedent That Employer Taxes For Government Benefit Programs Are Not "Wages" Workers Receive As Part Of The Contract Of Hire

The Court of Appeals followed *Erakovic* which holds government-mandated employer payments for general fund benefits such as Social Security, Medicare, or Industrial Insurance are not "wages" under RCW 51.08.178.[9] *Meštrovac*, 142 Wn. App. at 712 (citing *Erakovic v. Dep't of*

[9] Time-loss benefit rates are "determined by reference to a worker's wage at the time of injury." *Gallo v. Dep't of Labor & Indus.*, 155 Wn.2d 470, 481, 120 P.3d 564 (2005). Wages include the "reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire". RCW 51.08.178(1); *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 806-22, 16 P.3d 583 (2001) (employer paid healthcare under employment contract are wages); *Gallo*, 155 Wn.2d at 491-94 (retirement, life insurance, and certain other fringe benefits are not wages).

Labor & Indus., 132 Wn. App. 762, 769-75, 134 P.3d 234 (2006)).[10] Similarly, government-mandated payments for unemployment compensation are not wages. *Meštrovac*, 142 Wn. App. at 712; *Ferenćak*, 142 Wn. App. at 725-27; *Kustura*, 142 Wn. App. at 689-91.

Meštrovac essentially seeks review of *Eraković* in arguing that *Eraković* was wrongfully decided and conflicts with *Department of Labor & Industries v. Granger*, 159 Wn.2d 752, 153 P.3d 839 (2007). Petition at 16-17. There is no conflict. DLI COA Supp. Br. at 6-10.

"*Granger* did not address whether government-mandated employer payments to general funds are 'consideration of like nature' under RCW 51.08.178(1)." *Ferenćak*, 142 Wn. App. at 726.[11] Government taxes for social funds are not "wages," in part because such payments, unlike those for healthcare, "are not earmarked for a specific employer's employees". *Eraković*, 132 Wn. App. at 770. "The plain language of RCW 51.08.178 requires that any 'consideration' must be received from the employer as part of the contract for hire." *Id.*; RCW 51.08.178(1) (defining wages as "received from the employer as part of the contract of hire").[12]

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[10] The same attorney who represents Meštrovac represented worker Eraković.

[11] *Granger* only addressed whether employer payments for an employee into a healthcare trust fund were received at the time of injury when the employee was not yet eligible for the healthcare. *Granger*, 159 Wn.2d at 759; *Ferenćak*, 142 Wn. App. at 726. *Granger* did not need to ask whether employer payments for healthcare are consideration of like nature, which *Cockle* had already answered yes. *Ferenćak*, 142 Wn. App. at 726.

[12] Also, these taxes were not consideration "of like nature" because they were not critical to workers' basic health and survival such that workers had to replace them

Meštrovac offers no argument not raised in *Eraković* and no good reason to suggest it was wrong. Review is not warranted on this issue.

D. Meštrovac's Vacation And Holiday Pay Was Properly Included In The Wage Computation Based On His Full-Time Employment Under RCW 51.08.178(1).

Meštrovac argues that the Board wage computation failed to take into account his vacation and holiday pay. Petition at 17-18. His fact-bound argument lacks merit and presents no basis for review.

RCW 51.08.178(1) requires compensation to be based on "the monthly wages the worker was receiving . . . at the time of injury," calculated by the dollars per hour, hours per day, and days per week. *In re Kay Shearer*, BIIA Dec., 96 3384 & 96 3385, 1998 WL 440532 (1998), *aff'd, Fred Meyer, Inc. v. Shearer*, 102 Wn. App. 336, 339-40, 8 P.3d 310 (2000). This formula included Meštrovac's vacation and holiday pay (pay without actual work) based on his full-time employment. *Meštrovac*, 142 Wn. App. at 712; FF 1. As Meštrovac's expert testified, his vacation and holiday pay was "included in the basic pay rate." Moss (8/6/04) 38.[13]

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during their disability. *See Eraković*, 132 Wn. App. at 770-75 (following *Cockle* and *Gallo* critical survival test).

[13] *Shearer* does not support Meštrovac. The paid vacation and holidays a worker *received* should not be *deducted* from his or her *hours worked*, because they represent "benefits paid in lieu of work". *Shearer*, 102 Wn. App. at 340. Here, there is no claim that in computing Meštrovac's wage, the Department deducted from his hours worked any of his previously received vacation or holidays. *See Ferenćak*, 142 Wn. App. at 723 (distinguishing *Shearer* in rejecting the same argument Meštrovac raises here).

Meštrovac did not challenge the finding that there is no evidence he worked any holidays. FF 4. This finding is a verity. RAP 10.3(a)(3); *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 733 n.6, 57 P.3d 611 (2002) (unchallenged finding is a verity). In fact, the pay stubs he offered into evidence did not show he worked any holidays. BR Ex. 37.[14]

Without reference to the record, Meštrovac claims that there was evidence he had "accumulated significant holiday and vacation time for which he would be paid on discharge." Petition at 18. Meštrovac cashed out an unknown amount of accumulated vacation *upon his discharge.* Hartzer (8/6/04); 142-43; FF 5. But what he received *due to discharge* is irrelevant to the monthly wages he "was receiving . . . at the time of injury." RCW 51.08.178(1); *Cockle*, 142 Wn.2d at 814 (time-loss benefits are intended to reflect *lost*, "not *retained* earning capacity").

E. Meštrovac's Belated Equal Protection Challenge To Statutory Wage Computation Fails To Show Manifest Error For Review

For the first time, Meštrovac argues RCW 51.08.178 violates equal protection in allowing intermittently and seasonally employed, but not

[14] Meštrovac claims it is "patently unfair" to assume he did not work any holidays or vacations. Petition at 18. He ignores that he had the burden of proving the incorrectness of the Department wage computation at the Board. *See* RCW 51.52.050 ("the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought"). At the superior court, the Board wage conclusions were "prima facie correct," and Meštrovac had the burden of proving to the contrary. *Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987); RCW 51.52.115.

continuously employed, workers to include overtime premium in wage computation. Petition at 12-15. His argument is too late. *See* RAP 2.5(a).

Meštrovac claims he can raise his new equal protection argument under RAP 2.5(a)(3). Petition at 15 n.5. But that rule requires a "manifest error affecting a constitutional right." RAP 2.5(a)(3). Meštrovac "must identify a constitutional error and show how the alleged error actually affected [his] rights at trial." *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). He fails to do so, and review is thus not warranted.

In any event, Meštrovac presents no colorable equal protection issue. Rational basis test applies to worker benefits statutes. *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 477, 843 P.2d 1056 (1993). The statute is presumed constitutional unless Meštrovac proves that it is "purely arbitrary," and it must be upheld "if any *conceivable* state of facts reasonably justifies" it. *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 226, 5 P.3d 691 (2000) (emphasis added) (citation omitted).

RCW 51.08.178 provides two main methods for computing "monthly wages" from which time-loss benefits are determined. Subsection (1) is the "default provision" that presumptively applies. *Dep't of Labor & Indus. v. Avundes*, 140 Wn.2d 282, 290, 996 P.2d 593 (2000). It sets *conclusively assumed* monthly wages for a worker in reasonably continuous employment, based strictly on the schedule ("normally

employed" hours per day and days per week) as of the date of injury. *Sch. Dist. No. 401 v. Minturn*, 83 Wn. App. 1, 5-6, 920 P.2d 601 (1996) (discussing this assumed wage calculation method). Under subsection (1), even if a worker has a history of regular, significant extended periods of weeks or months without work, the assumed wage calculation requires the fiction that the worker was employed 52 weeks per year. *Id.* The subsection (1) method includes overtime hours in determining the weekly schedule "normally" worked, but not the premium part of overtime pay ("a half" in "time and a half"). *See Meštrovac*, 142 Wn. App. at 711 n.31.

Subsection (2) applies only to a small number of workers engaged in "exclusively seasonal" or "essentially part-time or intermittent" employment. RCW 51.08.178(2).[15] The statute determines their monthly wages by averaging their *actual* wages, including the premium rate

[15] Because the 12-month wage averaging under subsection (2) almost always results in lower monthly wages for exclusively seasonal or "essentially part-time or intermittent workers than under subsection (1), this Court has liberally construed and thus very narrowly read the employment covered under subsection (2). *See Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 798-800, 952 P.2d 590 (1997) (general laborer who worked from May through October in one year and from February to early November in the following two years before his injury was not exclusively seasonal worker); *Avundes,* 140 Wn.2d at 285-90 (general farm laborer who worked 19 different jobs in 14 months before he was injured when cutting asparagus was not an essentially part-time or intermittent worker despite that fact of many extended gaps in his employment and achievement of only 60% of his goal of full-time work); *Dep't of Labor & Indus. v. Avundes,* 95 Wn. App. 265, 267-77, 976 P.2d 637 (1999) (same); *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 912-16, 138 P.3d 177 (2006) (golf course groundskeeper who was laid off every year from the fall through spring was not essentially intermittent).

portion of their overtime pay, in a 12-successive-month period that fairly represents their work pattern. RCW 51.08.178(2).

Meštrovac's constitutional argument addresses *only* the exclusion and inclusion of overtime premium in the two wage computation methods. Petition at 14-15. He does not address the differences in the overall wage computation methods – *fictional* monthly wage computation under subsection (1) and *actual* averaged monthly wages in subsection (2). Nor does he demonstrate that subsection (1) workers are *similarly situated* to exclusively seasonal or essentially part-time or intermittent workers. *See Texas Workers' Comp. Comm'n v. Garcia*, 862 S.W.2d 61, 102 (Tex. Ct. App. 1993) (under equal protection, there are "distinctions calling for a different [wage computation] treatment of seasonal workers and non-seasonal workers), *rev'd on other grounds*, 893 S.W.2d 504 (Tex. 1995). His thus fails to overcome the presumption of constitutionality.

Further, there is nothing irrational about excluding overtime premium in the wage computation in subsection (1) while including it in (2). Subsection (1) workers are compensated on the assumption they are employed 52 weeks per year, regardless of layoffs, breaks in employment, or unpaid vacation. On the other hand, subsection (2) workers do not have such protection; their wage computation is actual and gives them no credit slack periods. It is reasonable for the Legislature to conclude that the

actual wages averaged in subsection (2) should include the actual overtime premium, while the *assumed* monthly wage under subsection (1), which often overstates the actual lost wages, should not include the premium for overtime (which would compound the overstated loss).

In sum, Meštrovac's belated equal protection argument is not preserved and does not present any manifest error appropriate for review.

V. CONCLUSION

For the reasons stated above, the Department requests that the Court deny Meštrovac's petition for review.

RESPECTFULLY SUBMITTED this 9th day of August, 2008.

ROBERT M. MCKENNA
Attorney General

Masako Kanazawa
Masako Kanazawa, WSBA #32703
Assistant Attorney General

John R Wasberg
John R. Wasberg, WSBA #6409
Senior Counsel
Attorneys for Respondent

APPENDICES

A Superior court order

B Board order

C Department orders

Appendix A

Superior court order

FILED
KING COUNTY, WASHINGTON

MAR 21 2006

SUPERIOR COURT CLERK
BY JACQUELINE B. ANTICH
DEPUTY

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

ENVER MESTROVAC,

Plaintiff,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Defendant.

Cause No. 05-2-22775-3 KNT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on regularly before the Honorable Deborah Fleck in open court on February 16, 2006. The Plaintiff, ENVER MESTROVAC, appeared through his counsel, Ann Pearl Owen; the Defendant, Department of Labor and Industries (Department), appeared through its counsel, Rob McKenna, Attorney General, per Marta Lowy, Assistant Attorney General, and Portia C. Guerrero, Assistant Attorney General. The Court reviewed the records and files herein, including the Certified Appeal Board Record, and briefs submitted by counsel, and heard argument of Counsel. Therefore, being fully informed, the Court makes the following:

I. FINDINGS OF FACT

1.1 Hearings were held at the Board of Industrial Insurance Appeals (Board) on August 6, 2004 and September 2, 2004.

Thereafter an Industrial Appeals Judge issued a Proposed Decision and Order on November 22, 2004, from which the Department and the Plaintiff filed timely Petitions for Review. On February 3, 2005, the Board, having considered Department and the Plaintiff's Petitions for Review, granted the same. On June 9, 2005, the Board, after consideration of the Proposed Decision and Order and the Petitions for Review, and a careful review of the entire record before it, issued a Decision and Order reversing the Department's orders dated October 10, 2003, October 24, 2003, and November 7, 2003. Plaintiff thereupon timely appealed the Board's June 9, 2005 order to this Court.

1.2 The Department orders on appeal are dated: October 10, 2003; October 24, 2003; and November 7, 2003. The Department Order dated October 10, 2003, is a Payment Order for time-loss compensation from 09/23/03 through 10/06/03 in the amount of $452.06. The Department Order dated October 24, 2003, is a Payment Order for time-loss compensation from 10/07/03 through 10/20/03 in the amount of $452.06. The Department Order dated November 7, 2003 is a Payment Order for time-loss compensation from 10/21/03 through 11/03/03 in the amount of $452.06.

1.3 The Board's Finding of Fact Nos. 1, 2, 3, 4, 5, 6, 7 and 8 are correct and are adopted.

1.4 Enver Meštrovac, a native Bosnian speaker, came to the United States as a political refugee in 2001 and got a job with AAmerica through World Relief Organization. Mr. Meštrovac is not fluent in English.

1.5 All orders issued by the Department of Labor & Industries were issued in English. The Department's claim adjudicator realized that he was not dealing with a native English speaking person on Mr. Meštrovac's claim but made no effort to find out the native language group involved.

1.6 Mr. Meštrovac's notices of appeal raised the issue of his status as an immigrant and of his lack of English fluency. Despite this, the Industrial Appeals Judge refused to allow presentation of all the evidence on these issues and limited interpreter services at hearing to interpretation of matters on the record, preventing the interpreters from allowing Mr. Meštrovac to communicate with his counsel at breaks during the hearings.

Based upon the foregoing Findings of Fact, the Court now makes the following

II. CONCLUSIONS OF LAW

2.1 This Court has jurisdiction over the parties to, and the subject matter of, this appeal.

2.2 This Court does not have jurisdiction over the issue of the Department's provision of interpreter services to Mr. Meštrovac.

2.3 This Court adopts as its Conclusions of Law, the Conclusions of Law, Nos. 1, 2, 3, and 4 of the Decision and Order of the Board of Industrial Insurance Appeals, dated June 9, 2005.

2.4 The Board had jurisdiction over issues raised in Mr. Meštrovac's notices of appeal relating to his status as a non-English speaking injured worker. The Industrial Appeals Judge erroneously ruled the Board had not jurisdiction over those issues *sua sponte*, without affording Mr. Meštrovac either notice or the opportunity to provide briefing before making her ruling. The Board's designee further erred in affirming that ruling when presented by Mr. Meštrovac's interlocutory appeal of that ruling. At hearing, the Industrial Appeals Judge erroneously limited the presentation of evidence on those issues at hearing, which should have been received and put into colloquy to preserve that evidence for rulings by the Superior Court on this appeal. The Industrial Appeals Judge erred in not addressing these issues in the Proposed Decision and Order. The Board erred by omitting these issues in its Decision and Order.

2.5 The Board's June 9, 2005 Decision and Order is correct and is affirmed.

DATED this 20 day of March, 2006.

Deborah A. Fleck

JUDGE DEBORAH FLECK

FILED
KING COUNTY, WASHINGTON

MAR 21 2006

SUPERIOR COURT CLERK
BY JACQUELINE B. ANTICH
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ENVER MESTROVAC, Plaintiff, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Defendant.	Cause No. 05-2-22775-3 KNT JUDGMENT FOR DEPARTMENT

JUDGMENT SUMMARY (RCW 4.64.030)

1. Judgment Creditor:	State of Washington Department of Labor and Industries
2. Judgment Debtor:	ENVER MESTROVAC
3. Principal Amount of Judgment:	- 0 -
4. Interest to Date of Judgment:	- 0 -
5. Attorney Fees:	
6. Costs:	$ Costs per RCW 4.84
7. Other Recovery Amounts:	$0
8. Principal Judgment Amount shall bear interest at 0% per annum.	
9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.	
10. Attorneys for Judgment Creditor:	Marta Lowy, Portia C. Guerrero
11. Attorney for Judgment Debtor:	Ann Pearl Owen

This matter was tried by the Court without a jury on February 16, 2006, the Honorable Deborah Fleck presiding. The plaintiff, Enver Mestrovac, appeared through his attorney of record, Ann Pearl Owen. The defendant, the Department of Labor and Industries of the State of Washington, appeared through its attorney of record, Rob McKenna, Attorney General, per Portia C. Guerrero, Assistant Attorney General and Marta Lowy, Assistant Attorney General.

The Court reviewed the Certified Appeal Board Record, considered the pleadings filed in the action, and heard the oral argument of the parties' counsel. On March 20, 2006, the Court ruled in part in favor of the Department. The Court made findings of fact and conclusions of law on March 20, 2006, which were entered on March 20, 2006. [A copy of the Court's findings and conclusions is attached as Exhibit A.]

Consistent with findings and conclusions of March 20, 2006, the Court enters final judgment in this matter as follows:

1. The June 9, 2005 Board of Industrial Insurance Appeals Decision and Order, which reversed the Department of Labor and Industries' orders dated October 10, 2003, October 24, 2003, and November 7, 2003, be and the same are hereby affirmed.

2. The Defendant Department of Labor & Industries is ordered to determine the amount of interpreter expenses incurred by the Injured Worker in association with his industrial injury, and the interest owing on the interpreter expenses incurred by the Injured Worker, and is ordered to pay the Injured Worker for all his interpreter expenses incurred related to his Industrial Insurance claim with interest at 12% from the date the expenses were incurred until they are paid.

DATED this 20 day of March, 2006.

Deborah A. Fleck
JUDGE DEBORAH FLECK

FILED
KING COUNTY WASHINGTON
APR 19 2006
SUPERIOR COURT CLERK
RAMONA HARKI
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

ENVER MEŠTROVAC, Petitioner, vs. DEPARTMENT OF LABOR & INDUSTRIES, Respondent.	NO. 05-2-22775-3 KNT ORDER ON RECONSIDERATION

This matter came on before the undersigned for reconsideration of the court's decision dated March 20, 2006. The court has reviewed the respondent's motion for reconsideration, the petitioner's response and the documents in support, and is fully advised in the premises, now therefore,

ORDERED that Conclusions No. 2.2, 2.5 and 2.6 are amended as follows:

Conclusion No. 2.2: This Court has jurisdiction over the issue of the Department's use of English to communicate with Mr. Meštrovac regarding his claim and specifically in the orders issued in English and actions which Mr. Meštrovac

appealed to the Board and what relief Mr. Meštrovac is entitled to for interpreter services regarding his industrial insurance claim.

Conclusion No. 2.5: The Board's June 9, 2005 Decision and Order was correct as to the wage conclusion but was incorrect in failure to include findings of fact and conclusions of law regarding issues raised by Mr. Meštrovac regarding communications with him in English, his right to communications with his employer, the Department, and counsel of his choice regarding his industrial injury in his primary language or through interpreter services paid for by the Department.

Conclusion No. 2.6: The Board is directed to hold a hearing to determine the amount of all interpreter expenses Mr. Meštrovac incurred because of the Department's and the Board's failure to provide interpreter services for Mr. Meštrovac to communicate with the Department, his employer, his health care providers, and his lawyer regarding and about his claim and to award him those expenses plus interest at 1% per month from the date they were incurred under RCW 51.36.080. The Department shall pay those interpreter expenses incurred and interest thereon until the Board assumed jurisdiction. The Board shall pay those interpreter expenses incurred and interest thereon after Mr. Meštrovac filed his first notice of appeal to the Board.

DATED: April 17, 2006

Deborah D. Fleck

JUDGE DEBORAH D. FLECK

Appendix B

Board order

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ENVER MESTROVAC) DOCKET NOS. 03 17948, 03 18255 & 04 18245
)
CLAIM NO. Y-654934) DECISION AND ORDER

APPEARANCES:

Claimant, Enver Mestrovac, by
Ann Pearl Owen, P.S., per
Ann P. Owen

Employer, A-America, Inc., by
The Law Office of Robert M. Arim, PLLC, per
Robert M. Arim

Department of Labor and Industries, by
The Office of the Attorney General, per
Marta Lowy, Assistant

In Docket No. 03 17948, the claimant, Enver Mestrovac, filed an appeal with the Board of Industrial Insurance Appeals on October 22, 2003, from an order of the Department of Labor and Industries dated October 10, 2003. In this order, the Department paid the claimant time-loss compensation benefits for the period of September 23, 2003 through October 6, 2003, at the monthly rate of $968.55 or $32.29 per day. The Department order is **REVERSED AND REMANDED.**

In Docket No. 03 18255, Mr. Mestrovac filed an appeal with the Board of Industrial Insurance Appeals on October 31, 2003, from an order of the Department of Labor and Industries dated October 24, 2003. In this order, the Department paid time-loss compensation benefits for the period of October 7, 2003 through October 20, 2003, at the monthly rate of $968.55 or $32.29 per day. The Department order is **REVERSED AND REMANDED.**

In Docket No. 04 18245, Mr. Mestrovac filed an appeal with the Department of Labor and Industries on November 13, 2003, from an order of the Department of Labor and Industries dated November 7, 2003. In this order, the Department paid the claimant time-loss compensation benefits for the period of October 21, 2003 through November 3, 2003, at the monthly rate of $968.55 or $32.29 per day. The claimant's appeal was forwarded to the Board of Industrial Insurance Appeals on July 19, 2004. The Department order is **REVERSED AND REMANDED.**

PROCEDURAL AND EVIDENTIARY MATTERS

Pursuant to RCW 51.52.104 and RCW 51.52.106, the appeals in Docket Nos. 03 17948 and 03 18255, are before the Board for review and decision on timely Petitions for Review filed by the

Department and the claimant to a Proposed Decision and Order issued on November 22, 2004. The industrial appeals judge reversed the Department orders of October 10, 2003 and October 24, 2003, and remanded to the Department with direction to issue an order finding that Mr. Mestrovac's monthly wage at the time of injury was $2,119.41, to determine his time-loss compensation rate in light of his monthly wages and his status as unmarried with no children, and to take such other action as is indicated by the facts and the law.

The appeal in Docket No. 04 18245 is before the Board for review and decision on timely Petitions for Review filed by the Department and the claimant to a Proposed Decision and Order issued on February 18, 2005. The industrial appeals judge reversed the Department order dated November 7, 2003, and remanded to the Department with direction to issue an order finding that Mr. Mestrovac's monthly wage at the time of injury was $2,119.41, to determine his time-loss compensation rate in light of his monthly wages and his status as unmarried with no children, and to take such other action as is indicated by the facts and the law.

All three of these appeals involve the same parties, record, and issues. The appeal in Docket No. 04 18245 is therefore consolidated with the appeals in Docket Nos. 03 17948 and 03 18255, pursuant to WAC 263-12-045(2)(i) and CR 42.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. All of the rulings are affirmed.

DECISION

These appeals raise the question of what factors should be included in the calculation of Enver Mestrovac's monthly wage under RCW 51.08.178, for purposes of computing his time-loss compensation rate under RCW 51.32.090 and 51.32.060. We agree with the proposed disposition of these appeals in all respects, with two exceptions. The industrial appeals judge directed the Department to include additional vacation and holiday pay in Mr. Mestrovac's monthly wage. However, the Department had already included the hours of paid holiday and vacation days within the base wage calculation. Mr. Mestrovac has not shown that he received any additional amounts that should be added to his monthly wage. We have therefore granted review for the sole purpose of providing the relief requested by the Department in its Petitions for Review.

At the outset, we wish to clarify that we are not analyzing holiday and vacation pay under the rubric of *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001). In *Cockle*, the Supreme Court interpreted a different aspect of wages, *i.e.*, "other consideration of like nature received from the employer as part of the contract of hire." RCW 51.08.178(1). Because holiday and vacation

pay are money wages, they do not fit within that part of RCW 51.08.178. We have previously adopted an approach to holiday and vacation pay similar to that applied to bonuses received in the year prior to injury under RCW 51.08.178(3) or the averaging and inclusion of overtime hours under RCW 51.08.178(1). *In re Vesna Erakovic*, Dckt. No. 02 16363 (January 28, 2004). Either approach applied here shows that Mr. Mestrovac is not entitled to the inclusion of any additional holiday or vacation pay in his wage calculation.

The evidence is fully and accurately discussed in the Proposed Decisions and Orders. We will not repeat that summary here, other than to provide context and explain our decision.

Mr. Mestrovac began working for A-America, Inc., (A-America) in the fall of 2001, unloading containers filled with furniture. He sustained an industrial injury to his right hand and wrist on May 6, 2003. He continued working for a time and then was discharged by the employer. June 27, 2003 was his last day of work. His final paycheck included payment for his banked vacation leave.

The Department calculated Mr. Mestrovac's base wage as $1,584 per month. The industrial appeals judge arrived at the same figure, based on $9 per hour, eight hours per day, and five days per week. RCW 51.08.178(1)(e). This calculation included any days when Mr. Mestrovac took paid vacation and holidays. In addition, the industrial appeals judge added 6.6 hours per month ($59.40) in vacation pay, reasoning that Mr. Mestrovac could cash out his vacation leave if he terminated his employment. She calculated this amount by prorating 80 hours of vacation leave over 12 months.

The industrial appeals judge also added 5.33 hours per month ($47.97) in extra holiday pay. She reasoned that, if Mr. Mestrovac worked a holiday, he was paid for that day, as well as receiving an additional eight hours in pay. She calculated the additional 5.33 hours by prorating 64 hours (eight holidays) over 12 months.

Holiday pay: Neither Mr. Mestrovac nor Cindy Hartzer, the employer's human resources manager, nor Robert W. Moss, the worker's expert economist, provided much detail on how the employer handles holiday pay. The employer's policy is contained in its Employee Policies and Practices Handbook:

> A-America provides eight (8) eight hour paid holidays per year. These are:
>
> New Year's Day[,] Memorial Day[,] Independence Day[,] Labor Day[,] Thanksgiving Day[,] Day After Thanksgiving[,] Christmas Eve Day[, and] Christmas Day[.]

. . . .

> Employees eligible for paid holidays and who work on a holiday will be paid for both the holiday and the actual day worked (except the Day After Thanksgiving will be used as a floating holiday for retail warehouse and customer service staff and will not be paid in addition to working hours that day). Holiday hours will be included as hours worked for overtime calculations.
>
> Accumulated or unused floating holidays will not be cashed out or paid if the employee leaves the Company for any reason.

Board Exhibit Nos. 8 and 9, at 93-94.

Under this policy, there are eight paid holidays. The extra pay provision only applies to seven of those holidays; the policy excludes the day after Thanksgiving. If an employee works that holiday, the employee does not receive extra pay. Instead, the employee receives a floating holiday, which cannot be cashed out upon termination.

A-America's policy appears to be similar to the one in *Erakovic*. In that case, we included extra holiday pay within the worker's monthly wage. But in *Erakovic*, there was evidence that the worker actually received holiday pay in addition to her usual wages during the pay period in which she was injured, and this resulted in an actual increase in her income. The Department contends that the current case is distinguishable from *Erakovic*, because here there is no evidence that Mr. Mestrovac ever worked on a holiday or received any additional payment as a result. The Department is correct.

Board Exhibit No. 37 includes earnings statements, with time card details, for pay periods during the year prior to Mr. Mestrovac's May 6, 2003 industrial injury. Pursuant to ER 201, we take judicial notice of the fact that Memorial Day fell on May 27, 2002; Independence Day fell on July 4, 2002; Labor Day fell on September 2, 2002; Thanksgiving Day fell on November 28, 2002; the day after Thanksgiving was November 29, 2002; Christmas Eve fell on December 24, 2002; Christmas Day fell on December 25, 2002; and New Year's Day fell on January 1, 2003. The earnings statement for the pay period that would have included Thanksgiving and the day after Thanksgiving in 2002 has not been provided in Board Exhibit No. 37. For the other six holidays, the time card details show that Mr. Mestrovac was paid for the holiday, but did not work. He did not receive any extra payment under the holiday policy.

Mr. Mestrovac had the burden of proof. It was incumbent on him to show that he in fact worked holidays and received extra pay. The evidence shows just the opposite. We therefore

agree with the Department. There is no basis for the additional 5.33 hours in holiday pay that the industrial appeals judge included in Mr. Mestrovac's wage calculation.

Vacation pay: A number of Board Decisions and Orders have addressed the question of whether banked vacation hours or pay should be included within the wage calculation. In *In re Park E. Johnson*, Dckt. No. 99 13440 (September 14, 2004), the employer paid the employee for the vacation time he did not take and included those vacation hours in the wage calculation. In *In re Daniel Renshaw*, Dckt. No. 02 16572 (August 27, 2003), the employer contributed $1 per hour to a vacation fund. The money was available to the employee like a savings fund. That contribution was therefore included in the wage calculation. In *In re Fred Jones*, BIIA Dec., 02 11439 (2003), the employee could withdraw from the vacation trust on a quarterly, twice a year, or yearly basis, depending on how he had set up the benefit. So the employer's $1.25 per hour contribution to the vacation trust was included in wages.

However, *Erakovic* is the case most similar to the current appeal. In *Erakovic*, we held that vacation pay would not be considered additional wages to an employee just because leave accumulated during the year prior to termination could be cashed out. In this case, Mr. Mestrovac accrued 3.08 hours of vacation leave every two-week pay period or 80 hours of vacation leave a year. Mr. Mestrovac was only eligible to cash out his accrued vacation leave upon termination. At that time, he could cash out up to 160 hours of accrued leave. Board Exhibit No. 8, at 96. When Mr. Mestrovac was terminated, he exercised that right. Just as we concluded in *Erakovic*, vacation pay is not considered additional wages when it is only available to the worker upon termination.

Because Mr. Mestrovac was only eligible to receive cash for vacation leave upon termination and because he retained the right to cash out his accumulated vacation leave, the cash out amount cannot be otherwise added to his wage calculation. "[T]ime-loss compensation is meant to 'reflect . . . *lost* earning capacity,' not *retained* earning capacity." *Cockle*, 142 Wn.2d at 814. Cash in lieu of vacation time was only available once and Mr. Mestrovac did not lose his ability to collect this "one time" payout due to his injury. The amount of his accrued vacation leave should not be included in his wage calculation. The industrial appeals judge was therefore incorrect in adding an additional 80 hours of vacation leave, prorated over 12 months, to the wage calculation.

Furthermore, Mr. Mestrovac did not have 80 hours of accumulated leave when he was discharged. June 27, 2003, was his last day of work. The last earning statement contained in Board Exhibit No. 37 is for the period ending May 10, 2003. At that time, Mr. Mestrovac only had 11.4 banked hours of vacation leave. Since he only accrued 3.08 hours of leave every two-week

pay period, he would have had considerably fewer than 80 hours of banked leave as of June 27, 2003.

Other issues: With respect to the other items Mr. Mestrovac seeks to have included in his monthly wage, we adopt the thoughtful analysis outlined by our industrial appeals judge. In his Petitions for Review, Mr. Mestrovac renews his contention that the Department is constitutionally required to provide interpretive services. The industrial appeals judge correctly determined that that issue was not properly before her. Not only is Mr. Mestrovac raising constitutional issues that cannot be addressed in this forum, but the orders appealed from do not address interpretive services at the Department level. Furthermore, to the extent Mr. Mestrovac is challenging the interpretive services that were provided during the Board proceedings, we note that the industrial appeals judge fully complied with the requirements of RCW 2.43 and WAC 263-12-097.

Mr. Mestrovac also asks this Board to impose a penalty against the Department pursuant to RCW 51.48.080, due to its underpayment of benefits. That issue is not before the Board in these appeals because it was not addressed by the Department in the orders under appeal. In addition, it is doubtful that there is any statutory basis for assessing a penalty against the Department for the underpayment of benefits. *See, e.g., In re Robert Long*, Dckt. No. 02 16356 (June 9, 2003) (There is no legal basis for assessing a penalty against the Department for late payment of benefits under RCW 51.48.017.)

Finally, Mr. Mestrovac seeks interest under RCW 51.52.135. That question will be addressed under WAC 263-12-160, after the issuance of a final order.

After careful consideration of the Proposed Decisions and Orders, the Petitions for Review, the claimant's Response, and the entire record, we make the following:

FINDINGS OF FACT

1. On May 6, 2003, the claimant, Enver Mestrovac, filed an Application for Benefits with the Department of Labor and Industries, in which he alleged that he was injured during the course of his employment with A-America, Inc., on May 6, 2003. On July 9, 2003, the Department issued an order in which it allowed the claim.

   On September 29, 2003, the Department issued an interlocutory order in which it paid time-loss compensation benefits for the period of September 9, 2003 through September 22, 2003, and set the time-loss compensation rate at $968.55, based upon monthly wages of $1,584 and the claimant's status as unmarried with no dependents.

On October 10, 2003, the Department issued an order in which it paid time-loss compensation benefits for the period of September 23, 2003 through October 6, 2003, at the monthly rate of $968.55 or $32.29 per day.

On October 20, 2003, Mr. Mestrovac filed a Protest and Request for Reconsideration regarding the calculation of the time-loss compensation rate.

On October 24, 2003, the Department issued an order in which it paid time-loss compensation benefits for the period of October 7, 2003 through October 20, 2003, at the monthly rate of $968.55 or $32.29 per day.

On October 22, 2003, Mr. Mestrovac filed a Notice of Appeal of the October 10, 2003 Department order with the Board of Industrial Insurance Appeals. On November 17, 2003, the Board issued an order in which it granted the appeal and assigned it Docket No. 03 17948.

On October 31, 2003, Mr. Mestrovac filed a Notice of Appeal of the October 24, 2003 Department order. On November 25, 2003, the Board issued an order in which it granted the appeal and assigned it Docket No. 03 18255.

On November 7, 2003, the Department issued an order in which it paid time-loss compensation benefits for the period of October 21, 2003 through November 3, 2003, at the monthly rate of $968.55 or $32.29 per day. On November 13, 2003, the claimant filed a Notice of Appeal of the November 7, 2003 Department order with the Department. That Notice of Appeal was forwarded to and received at the Board on July 19, 2004. On August 16, 2004, the Board issued an order in which it granted the appeal and assigned it Docket No. 04 18245.

2. On May 6, 2003, Enver Mestrovac sustained an industrial injury to his right hand and wrist during the course of his employment with A-America, Inc., at the company's Oak Barn facility.

3. As of May 6, 2003, Mr. Mestrovac was paid wages of $9 per hour, eight hours per day, five days per week, and worked on a full-time regular basis. In addition, Mr. Mestrovac worked an average of 10.39 overtime hours per month. Within the twelve months immediately preceding his injury, he received a bonus of $1,079.30, which averages out to $89.94 per month. He was unmarried with no children.

4. Under the employer's Employee Policies and Practices Handbook, an employee who works on Memorial Day, Independence Day, Labor Day, Thanksgiving, Christmas Eve, Christmas Day, or New Year's Day is paid for both the holiday and the actual day worked. An employee who works

the day after Thanksgiving receives a floating holiday that cannot be cashed out upon termination of employment. During the twelve months immediately preceding his injury, there is no evidence that Mr. Mestrovac worked any of these holidays or that he received any extra holiday pay or a that he was credited with a floating holiday.

5. As of May 6, 2003, Mr. Mestrovac was accruing 3.08 hours of vacation leave every two-week pay period or 80 hours of vacation leave a year. He could cash out up to 160 hours upon termination of his employment. After the industrial injury, he was discharged from employment by A-America, Inc. His last day of work was June 27, 2003. At that time, he had fewer than 160 hours of banked vacation leave. He cashed out his vacation leave when he was terminated from employment.

6. As of May 6, 2003, Enver Mestrovac was receiving healthcare benefits from premium payments made by his employer in the amount of $244.56 per month. The employer paid the premiums with coverage effective through July 31, 2003. His healthcare coverage was terminated thereafter. These benefits were critical to maintaining Mr. Mestrovac's basic health.

7. As of May 6, 2003, Mr. Mestrovac had coverage under the employer provided life insurance, short-term disability, and qualified retirement plan. The retirement plan consisted of a 401(k) savings account and profit-sharing. These benefits were not critical to protecting Mr. Mestrovac's basic health and survival.

8. As of May 6, 2003, A-America, Inc., was making regular payroll deductions from wages for necessary state and federal contributions to Social Security, Medicare, unemployment compensation, and industrial insurance. In addition, Mr. Mestrovac could have received other benefits, pursuant to contract, that included jury duty leave, leave of absence, family leave, employee discounts, membership in a credit union, a Costco membership, travel insurance, and a flexible medical spending account. These benefits were not critical to Mr. Mestrovac's basic health and survival.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of these consolidated timely appeals.

2. Under RCW 51.08.178(1) and (3), Mr. Mestrovac's monthly wages at the time of his injury included his hourly wages of $1,584 per month, his overtime at the rate of 10.39 hours or $93.51 per month, his bonus at the rate of $89.94 per month, and his healthcare benefits of $244.56 per month.

BULKY SUB

CASE # 05-2-22775-3
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SEGMENT 1 OF 1

3. Under RCW 51.08.178(1) and (3), Mr. Mestrovac's monthly wages at the time of his injury did not include extra holiday pay, the banked vacation leave which he cashed out when his employment was terminated, 401(k) contributions, profit sharing, life insurance, disability insurance, employee discounts, travel insurance, membership in a credit union, Costco membership, or contributions to state- and federally-mandated programs such as Social Security, Medicare, industrial insurance, and unemployment insurance.

4. The Department orders dated October 10, 2003, October 24, 2003, and November 7, 2003 are incorrect and are reversed. These matters are remanded to the Department of Labor and Industries with direction to issue an order finding that Mr. Mestrovac's monthly wage at the time of injury was $2,012.01, determining his time-loss compensation rate in light of his monthly wages and his status as unmarried with no children, and taking further action as indicated by the facts and the law.

It is so **ORDERED.**

Dated this 9th day of June, 2005.

BOARD OF INDUSTRIAL INSURANCE APPEALS

Thomas E. Egan

THOMAS E. EGAN — Chairperson

Calhoun Dickinson

CALHOUN DICKINSON — Member

DISSENT

I dissent because I disagree with the majority's decision to exclude the retirement plan (the 401(k) and profit sharing) and life insurance. These are in-kind benefits, which represent a benefit paid to Mr. Mestrovac instead of monetary wages. The court, in *Cockle*, re-emphasized the liberal construction policy designed to reduce economic hardship to the workers of this state. In Mr. Mestrovac's case, his hourly wage was substantially reduced by deductions for each of these benefits. He will probably be forced to purchase his own life or disability insurance without receiving any compensation to reflect his lost coverage. He may have to come up with a new pension plan. These are only two illustrations of the possible economic losses he will suffer.

I also disagree with the majority decision to exclude holiday pay and vacation pay. These represent cash wages paid to the worker. I disagree with the majority's failure to recognize these additional forms of in-kind compensation as necessary for the worker's health and survival and the failure to recognize the additional wages received as holiday and vacation pay.

Dated this 9th day of June, 2005.

FRANK E. FENNERTY, JR. Member

Appendix C

Department orders

EMPL: A AMERICA INC
C/O WA EMPLOYERS GROUP RETRO
P O BOX 3827
KENT WA 98032-0327

PROV: NAYAN ALVIN S MD
STE 100
13030 MILITARY RD S
TUKWILA WA 98168-3079

CLMT: ENVER MESTROVAC
4456 S 164TH ST
SEATTLE WA 98188-3213

State of Washington
Department of Labor and Industries
Division of Industrial Insurance
Olympia, WA 98504-4291

Claim Number : Y654934
Work Position ID: UC24
Mailing Date : 10/10/03
Injury Date : 05/06/03
Service Location: SEATTLE
UBI # : 600-131-053
Account ID : 360,883-00
Risk Class : 6306

Board of
Industrial Insurance Appeals
Olympia Washington

OCT 2 2 2003

RECEIVED

PAYMENT ORDER

TIME LOSS COMPENSATION IS PAID FROM 09/23/03 THROUGH 10/06/03 IN THE AMOUNT OF $ 452.06.

THE TIME LOSS COMPENSATION RATE FOR THE PAYMENT PERIOD:
09/23/03 THRU 10/06/03 IS $968.55 PER MONTH OR $32.29 PER DAY

IF YOU HAVE APPLIED FOR, OR ARE RECEIVING SOCIAL SECURITY BENEFITS, PLEASE NOTIFY YOUR CLAIMS MANAGER IMMEDIATELY.

NOTICE TO EMPLOYER: PLEASE CALL THE CLAIMS MANAGER AND THE CLAIMANT IF YOU HAVE LIGHT DUTY WORK AVAILABLE. EARLY RETURN-TO-WORK EFFORTS WILL BENEFIT BOTH YOU AND YOUR EMPLOYEE.

DO NOT CASH THIS WARRANT IF YOU WERE RELEASED FOR WORK OR RETURNED TO ANY TYPE OF WORK DURING THE PERIOD PAID BY THIS ORDER OF PAYMENT. PLEASE RETURN THE WARRANT TO LABOR AND INDUSTRIES, PO BOX 44293 OLYMPIA, WA 98504-4293.

TOTAL BENEFITS IN THE AMOUNT OF	$ 452.06
LESS DEDUCTIONS:	
NET ENTITLEMENT	$ 452.06

Name : ROBERT RENDON
Title: CLAIMS MANAGER
Phone: 360-902-4297

ATTACHMENT A

YOUR LEGAL RIGHTS IF YOU DISAGREE WITH THIS ORDER:
THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS COMMUNICATED TO YOU UNLESS YOU DO ONE OF THE FOLLOWING. YOU CAN EITHER FILE A WRITTEN REQUEST FOR RECONSIDERATION WITH THE DEPARTMENT OR FILE A WRITTEN APPEAL WITH THE BOARD OF INDUSTRIAL INSURANCE APPEALS. IF YOU FILE FOR RECONSIDERATION, YOU SHOULD INCLUDE THE REASONS YOU BELIEVE THIS DECISION IS WRONG AND SEND IT TO: DEPARTMENT OF LABOR AND INDUSTRIES, PO BOX 44291, OLYMPIA, WA 98504-4291. WE WILL REVIEW YOUR REQUEST AND ISSUE A NEW ORDER. IF YOU FILE AN APPEAL, SEND IT TO: BOARD OF INDUSTRIAL INSURANCE APPEALS, PO BOX 42401, OLYMPIA, WA. 98504-2401.

(CLAIMANT'S COPY -- PAYMENT ORDER)

160

EMPL: A AMERICA INC
C/O WA EMPLOYERS GROUP RETRO
P O BOX 3827
KENT WA 98032-0327

PROV: NAYAN ALVIN S MD
STE 100
13030 MILITARY RD S
TUKWILA WA 98168-3079

CLMT: ENVER MESTROVAC
%ANN PEARL OWEN ATTORNEY
2407 14TH AVE S
SEATTLE WA 98144-5014

State of Washington
Department of Labor and Industries
Division of Industrial Insurance
Olympia, WA 98504-4291

Claim Number : Y654934
Work Position ID: UC24
Mailing Date : 10/24/03
Injury Date : 05/06/03
Service Location: SEATTLE
UBI # : 600-131-053
Account ID : 360,883-00
Risk Class : 6306

PAYMENT ORDER

TIME LOSS COMPENSATION IS PAID FROM 10/07/03 THROUGH 10/20/03 IN THE AMOUNT OF $ 452.06.

THE TIME LOSS COMPENSATION RATE FOR THE PAYMENT PERIOD:
10/07/03 THRU 10/20/03 IS $968.55 PER MONTH OR $32.29 PER DAY

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Title: CLAIMS MANAGER
Phone: 360-902-4297

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EMPL: A AMERICA INC
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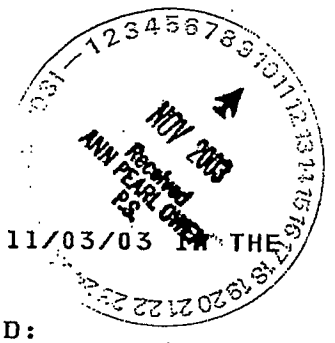
CLMT: ENVER MESTROVAC
%ANN PEARL OWEN ATTORNEY
2407 14TH AVE S
SEATTLE WA 98144-5014

State of Washington
Department of Labor and Industries
Division of Industrial Insurance
Olympia, WA 98504-4291

Claim Number : Y654934
Work Position ID: UC24
Mailing Date : 11/07/03
Injury Date : 05/06/03
Service Location: SEATTLE
UBI # : 600-131-053
Account ID : 360,883-00
Risk Class : 6306



PAYMENT ORDER

TIME LOSS COMPENSATION IS PAID FROM 10/21/03 THROUGH 11/03/03 IN THE AMOUNT OF $ 452.06.

THE TIME LOSS COMPENSATION RATE FOR THE PAYMENT PERIOD:
10/21/03 THRU 11/03/03 IS $968.55 PER MONTH OR $32.29 PER DAY

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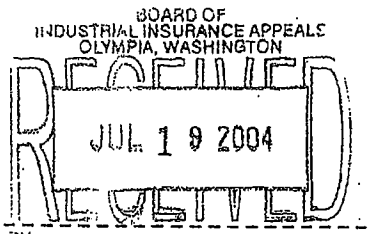
NET ENTITLEMENT	$ 452.06



Name : ROBERT RENDON
Title: CLAIMS MANAGER
Phone: 360-902-4297

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(CLAIMANT'S COPY -- PAYMENT ORDER)

NO. 81480-5

SUPREME COURT OF THE STATE OF WASHINGTON

ENVER MEŠTROVAC, Petitioner, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, AND THE BOARD OF INDUSTRIAL INSURANCE APPEALS, Respondents.	CERTIFICATE OF SERVICE

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2008 AUG 19 A 10: 22
BY RONALD R. CARPENTER
CLERK

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that she caused copies of the **Answer to Petition for Review with Appendices** and this **Certificate of Service** to be served and delivered to the parties of record as follows:

BY ABC LEGAL SERVICES AND COURTESY COPY BY E-MAIL:
(this party did not agree to service by e-mail).

ANN PEARL OWEN
ANN PEARL OWEN PS
2407 14TH AVENUE SOUTH
SEATTLE, WA 98144-5014
ANNPEARL@GMAIL.COM

BY E-MAIL:
(the following parties agreed to accept service by e-mail).

MICHAEL J. PONTAROLO
ATTORNEY AT LAW
MIKEP@DCTPW.COM

PAULA T. OLSON
BURGESS FITZER, P.S.
PAULAO@BURGESSFITZER.COM

KELBY DAHMER FLETCHER
PETERSON YOUNG PUTRA ET AL
MAIL@PYPFIRM.COM

JOHNNA S. CRAIG
SPENCER W. DANIELS
ASSISTANT ATTORNEYS GENERAL
SPENCERD@ATG.WA.GOV
JOHNNAS@ATG.WA.GOV

BRYAN P. HARNETIAUX
WSTLA FOUNDATION
AMICUSWSTLAF@WINSTONCASHATT.COM

DATED AT Seattle, Washington, August 19th, 2008.

Masako Kanazawa

Masako Kanazawa, WSBA #32703
Assistant Attorney General
800 Fifth Avenue Suite 2000
Seattle, WA 98104
(206) 389-2126

OFFICE RECEPTIONIST, CLERK

To: Kanazawa, Masako (ATG)
Cc: annpearl; mikep@dctpw.com; Paula Olson; Daniels, Spencer (ATG); Craig, Johnna Skyles (ATG); amicuswstlaf@winstoncashatt.com; Wasberg, John (ATG); mail@pypfirm.com
Subject: RE: Meštrovac v. Department of Labor & Industries, No. 81480-5

Rec. 8-19-08

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Kanazawa, Masako (ATG) [mailto:MasakoK@ATG.WA.GOV]
Sent: Tuesday, August 19, 2008 9:46 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: annpearl; mikep@dctpw.com; Paula Olson; Daniels, Spencer (ATG); Craig, Johnna Skyles (ATG); amicuswstlaf@winstoncashatt.com; Wasberg, John (ATG); mail@pypfirm.com
Subject: Meštrovac v. Department of Labor & Industries, No. 81480-5

Dear Clerk,

Attached for filing is the Department of Labor & Industries (1) Answer to Petition for Review and (2) Certificate of Service in *Meštrovac v. Department of Labor & Industries*, No. 81480-5

<<DEPARTMENT'S ANSWER TO PETITION FOR REVIEW.pdf>> <<CERTIFICATE OF SERVICE ANSWER TO PFR.pdf>>

The counsel for Petitioner Enver Meštrovac is receiving this email as courtesy, with the paper copies being delivered to her under applicable rules.

Sincerely,

Masako Kanazawa, WSBA #32703

Assistant Attorney General

(206) 389-2126

masakok@atg.wa.gov